

178631  
SA

C. DUKES SCOTT  
EXECUTIVE DIRECTOR

P.O. Box 11263  
Columbia, S.C. 29211



Phone: (803) 737-0800  
Fax: (803) 737-0801

DAN E. ARNETT  
CHIEF OF STAFF

RECEIVED  
MAR 27 PM 4:35  
SC PUBLIC SERVICE COMMISSION

March 27, 2006

Mr. Charles L.A. Terreni  
Chief Clerk/Administrator  
**South Carolina Public Service Commission**  
101 Executive Center Dr., Suite 100  
Columbia, SC 29210

Re: Docket No. 2005-57-C – Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended

Dear Mr. Terreni:

On Thursday, March 23, 2006, the Commission held a hearing in the above referenced matter regarding the testimony of Mr. Hamilton E. Russell, III, a witness on behalf of NuVox Communications, Inc. During this proceeding, several issues were raised regarding the ability of Mr. Russell to testify in light of his current employment by the law firm of Nelson Mullins Riley & Scarborough, LLP, which also represents BellSouth Telecommunications, Inc. Specifically, the question posed was whether the South Carolina Rules of Professional Conduct would prohibit Mr. Russell from testifying for NuVox and whether the Commission has the ability to rule on such an issue. Offering a possible solution to this question, Mr. Ken Millwood, appearing on behalf of Nelson Mullins, recommended that the Commission certify this issue to the South Carolina Supreme Court for a ruling. As a result, the Commission requested the parties file briefs giving guidance as to whether such a course of action is possible.

After reviewing the relevant case law, statutes and court rules, the Office of Regulatory Staff is unable to find authority for the Commission to take such an action. Specifically, Rule 228 of the South Carolina Appellate Court Rules states:

The Supreme Court in its discretion may answer questions of law certified to it by any federal court of the United States or the highest appellate court or an intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

The rules do not address the certification of issues by administrative agencies. Additionally, the South Carolina Supreme Court, in interpreting this rule, has declined to accept certification of issues from forums other than those specifically referenced in this rule. See In re Breast Implant Product Liability Litigation, 331 S.C. 540, 503 S.E.2d 445 (1998) (holding there is no provision under Rule 228 for the Supreme Court to answer questions certified by a state circuit judge).

Certain states have allowed such a procedure by way of statutory authority or Court Rules. For example, pursuant to its Appellate Court Rules, Wyoming allows administrative agencies to certify questions of law to state district court. W.R.A.P. 11.01. North Carolina, allows certain agencies, such as the North Carolina Industrial Commission, to certify questions to the Court of Appeals pursuant to state statute. N.C.G.S.A. § 97-86. South Carolina, however, has no comparable provisions for state agencies to certify questions to the courts; therefore, ORS is unable to provide the Commission with guidance as how to certify this question as recommended.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Benjamin P. Mustian', with a stylized, flowing script.

Benjamin P. Mustian

cc: Parties of Record